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Nos. 84-237, 84-238, 84-239

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1984

YOLANDA AGUILAR, *et al.*,

Appellants,

v.

BETTY-LOUISE FELTON, *et al.*,

Appellees.

SECRETARY, U.S. DEPARTMENT OF EDUCATION,

Appellant,

v.

BETTY-LOUISE FELTON, *et al.*,

Appellees.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Appellant,

v.

BETTY-LOUISE FELTON, *et al.*,

Appellees.

BRIEF *AMICUS CURIAE* FOR THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Is a government program which funds and administers remedial education services provided by public employees on the premises of church schools during regular school hours unconstitutional?

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

The Anti-Defamation League of B'nai B'rith submits this brief in support of the appellees and respectfully submits that the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

INTEREST OF THE *AMICUS CURIAE*

The Anti-Defamation League of B'nai B'rith was founded over seventy years ago to combat racial and religious prejudice and discrimination in the United States. The Anti-Defamation League has always adhered to the principle that these goals, as well as the strength, stability and integrity of our democracy, can only be served by vigorous support of the First Amendment, mandating separation of church and state and guaranteeing the free exercise of religion.

In support of these beliefs the Anti-Defamation League has in the past filed briefs *amicus curiae* in this Court supporting both the mutual independence of government and religion, and the First Amendment rights of religious minorities. *E.g., Thornton* v. *Caldor*, No. 83-1158 (Sup. Ct. argued Nov. 7, 1984); *Lynch* v. *Donnelly*, ___ U.S. ___, 104 S. Ct. 1355 (1984); *Marsh* v. *Chambers*, ___ U.S. ___, 103 S. Ct. 3330 (1983); *Mueller* v. *Allen*, ___ U.S. ___, 103 S. Ct. 3062 (1983); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Wolman* v. *Walter*, 433 U.S. 229 (1977); *Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948).

The rights of minority religions are no less at stake in establishment clause cases than in free exercise cases. History has demonstrated that the inevitable result of a union of government and religion is the destruction of religious freedom for those who believe differently from the majority. The Anti-Defamation League, therefore, has consistently advocated a strict interpretation of the establishment clause, in order to protect "our remarkable and precious religious diversity as a nation." *Lynch* v. *Donnelly*, 103 S. Ct. 1355, 1371 (Brennan, J., dissenting).

SUMMARY OF ARGUMENT

This case presents to the Court a narrow issue of constitutional law. Neither congressional authority and commitment to funding remedial educational services for economically and educationally

deprived children, nor the responsibility of local educational agencies to provide public and nonpublic students with comparable remedial services, is at issue. In supporting appellees' challenge to the constitutionality of New York City's Title I program, *Amicus* submits that the City has chosen to provide those services in a manner which is not required by federal law and which violates the establishment clause. *Cf. Wheeler* v. *Barrera*, 417 U.S. 402, 419 (1974) ("the State is not obligated by Title I to provide on-the-premises instruction.").

The constitutionality of New York City's Title I program is governed by this Court's decisions in *Meek* v. *Pittenger*, 421 U.S. 349 (1975) and *Wolman* v. *Walter*, 433 U.S. 229 (1977), holding that government financed remedial instruction, guidance counseling and therapeutic services provided on parochial school premises violate the First Amendment. New York City's Title I program falls squarely within this prohibition and should be ruled unconstitutional on its face.

Providing Title I services in parochial schools in conformity with the parochial schools' schedule and school calendar substantially enhances the school's ability to attract students, thereby promoting its religious mission. The religious atmosphere under which public employees are required to teach pervades the publicly funded classes, further diffusing the schools' religious influence.

In addition, New York City's Title I program requires interaction between public and religious authorities which constitutes excessive entanglement prohibited by the First Amendment. The impermissible entanglement between government and religion occasioned by the program can be eliminated by implementing alternative plans for Title I services which would involve off-premise teaching and counseling.

The availability of Title I services for educationally deprived children from low income areas on the premises of church-sponsored schools, presents an appealing case in which personal sympathies may be in conflict with our obligation to uphold establishment clause principles. *Amicus* recognizes that only a

thorough reformulation of New York City's Title I program will cure the constitutional defects inherent in the provision of publicly funded education services on the premises of religious institutions. *Amicus* believes, however, that in order to maintain the letter and the spirit of the First Amendment, the program must be struck down.

The establishment clause principles which have guided this country and this Court for over 200 years must be applied even-handedly. This fundamental precept is crucial in cases in which this Court's decision will have a significant and lasting effect on the institution of public education in the United States. *See Brown* v. *Board of Education*, 347 U.S. 483 (1954).

ARGUMENT

POINT ONE

NEW YORK CITY'S TITLE I PROGRAM ADVANCES RELIGION BY SPONSORING PUBLICLY FINANCED EDUCATIONAL ACTIVITIES ON PAROCHIAL SCHOOL PREMISES

A. New York City's Title I Program Is Unconstitutional On Its Face

The provisions of New York City's Title I program compel a holding of facial unconstitutionality. By providing remedial instruction classes, guidance and counseling sessions in the pervasively religious atmosphere of church-sponsored elementary and secondary schools, the City has extended the religious function of the parochial school to encompass the publicly funded services.

Although appellants (defendants below) have stressed the eighteen year history of New York City's program as evidence that Title I has not fostered religion, this Court need not engage in an examination of the plan's day-to-day implementation in order to hold New York City's Title I program unconstitutional. *See, e.g., Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Wolman* v. *Walter*, 433 U.S. 229 (1977). While in *Wheeler* v. *Barrera*, 417

U.S. 402, 426 (1974), the Court refused to rule on the constitutionality of a Title I plan not yet formulated, stating "the First Amendment implications may vary according to the precise contours of the plan that is formulated," in contrast, the Title I program before the Court today is in place and operating. It can, therefore, be examined in detail.

Although the majority in *Meek*, 421 U.S. 349, 372, did not rest its decision on "effect" grounds, the Court noted the "potential for impermissible fostering of religion" which exists when public employees provide services in church-related schools:

> To be sure, auxiliary-services personnel, because not employed by the nonpublic schools, are not directly subject to the discipline of a religious authority. But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained.

Meek, 421 U.S. at 371 (citations omitted).

The remedial instruction offered under Title I is equally, if not more, important than the services challenged in *Meek*. Because the instruction is intended to improve a child's overall school performance, frequent conferences between Title I professionals and the parochial school authorities are essential. These meetings must necessarily include discussion and evaluation of the parochial student's behavior, progress and/or problems in areas of education under the control of religious authorities. In addition, Title I professionals in some areas concentrate instruction on skills easily transferrable to other classes and activities. In order for Title I professionals to provide effective assistance to their students, a thorough understanding of the nature and requirements of other school courses is necessary. The conferences between public employees and parochial authorities are not supervised or observed by Title I field supervisors. They provide frequent opportunity for public employees to absorb the religious values and influence of the host school and to pass it on, uncensored, to their students.

The Second Circuit was unpersuaded by the appellants' claim that no recorded complaint has been made of interference by parochial authorities with Title I services or that public teachers have engaged in religious activity. The court of appeals, in fact, slip op. at 35, found a "lack of any incentive for complaint":

> The nonpublic schools, which had to apply for Title I assistance, are happy to have it, even, perhaps all the more, if an occasional teacher or counselor has strayed into religious paths. Similar considerations apply to the students; they have chosen to have, or at least have become used to having, some degree of religious content in their instruction, and are unlikely to notice or complain if some of this should find its way into the remedial classroom or counseling center. The same considerations apply to the parents. Teachers and counselors will not complain of their own conduct even assuming they recognize, as they may not always do, that they have crossed the line.

Slip op. at 35-36.

B. New York City's Title I Program Benefits Religion By Advancing the Religious Values of Church Schools

In *Wolman* v. *Walter*, 433 U.S. 229, 247 (1977), the Court upheld public funding of remedial, therapeutic and guidance services for parochial students only where the services were provided under circumstances reflecting "religious neutrality." A primary consideration in defining neutrality was the situs of the services. The *Wolman* Court interpreted *Meek*, 421 U.S. at 371, as "acknowledg[ing] the danger that publicly employed personnel who provide [analogous] services . . . might transmit religious instruction and advance religious beliefs in their activities. But . . . this danger arose from the fact that the services were performed in the pervasively sectarian atmosphere of the church-related school." *Wolman*, 433 U.S. at 247 (citation omitted). It was the *environmental* pressures which the Court found might alter teachers' behavior. Recognizing that the danger identified in *Meek* originated from the religious nature of the institution, not the students, 433 U.S. at 247-248, the *Wolman* Court held that

remedial and therapeutic services provided to parochial school students at off-site neutral premises will not have the effect of advancing religion in violation of the establishment clause.

Attempts by the City and the church schools to reduce the religious atmosphere of the parochial host schools fail to neutralize the effect of the Title I program, according to the finding of the court of appeals below. Church schools are instructed by the City to remove religious symbols from classrooms used for Title I instruction. Further, religious school authorities have argued that the schools in the program are not the "pervasively religious" institutions described in *Meek*, 421 U.S. at 356. Notwithstanding, the absence of religious symbols in Title I classes is immaterial in light of the religious symbolism which remains in hallways, meeting rooms and other classrooms. Further, neither the removal of religious symbols nor self-serving assertions by school and religious authorities can change the essentially religious nature of the schools. After reviewing the evidence, including affidavits from religious school administrators, the Second Circuit stated: "Indeed, the picture that emerges is of a system in which religious considerations play a key role in the selection of students and teachers, and which has as its substantial purpose the inculcation of religious values." Slip op. at 42 (footnote omitted).

The benefit to parochial schools in this case goes far beyond permissible accommodation. *See Sherbert* v. *Verner*, 374 U.S. 398 (1963). In *Zorach* v. *Clauson*, 343 U.S. 306, 313-314 (1952), this Court held that released time for religious instruction off the premises of public schools posed no establishment problems, stating: "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs." The *Zorach* Court went on to state, however, that "[g]overnment may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education

. . . ." 343 U.S. at 314. The facts of the case before the Court today fall squarely within the prohibitions articulated in *Zorach*. Mingling public and parochial classes on the premises of church schools cannot be regarded as simply "respecting" the religious nature of children who are eligible for Title I assistance and attend parochial schools. Rather, the City's Title I program constitutes the "blend" of church and state education of the type proscribed in *Zorach*.

C. By Providing Public Instruction in Church Schools, Government Appears To Be Endorsing Religion and Religious Teaching

This Court's establishment clause analysis has consistently reflected a heightened concern for government financed religious activities which involve elementary and secondary school children. *See, e.g., School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948). *Cf. Widmar* v. *Vincent*, 454 U.S. 263, 274 n.14 (1981). Recognizing this concern in *Brandon* v. *Board of Education*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), the Second Circuit declared:

> Our nation's elementary and secondary schools play a unique role in transmitting basic fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit . . . . Misconceptions over the appropriate roles of church and state learned during one's school years may never be corrected.

635 F.2d at 978 (citations omitted).

New York City's Title I program entails considerably more than "the mere appearance of secular involvement." *Id.* The City has, in effect, inserted important and highly visible elements of a public school program, operated by public school personnel and funded by public money, into the curriculum of religious

schools, thereby supporting and advancing religion in violation of the First Amendment.

The distinction between elementary and secondary schools, on the one hand, and colleges and universities, on the other, is clearly demonstrated by the Court's opinion in *Widmar* v. *Vincent*, 454 U.S. 263, 274, n.14 (1981), where the majority stated: "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy [of allowing religious groups access to campus facilities] is one of neutrality toward religion." Unlike the students in *Widmar*, however, the students in New York City's Title I program are elementary and secondary age level children.

For these young and impressionable students, importing public school teachers into the parochial schools and providing classes on the religious school premises places the imprimatur of the state upon the parochial schools. Students may be unable to distinguish the state as the administrative sponsor of the remedial reading and arithmetic classes, in contrast to other reading and arithmetic classes sponsored by the parochial school. The Title I classes are integrated into the school schedule and are held in the same buildings as the students' regular classes. Moreover, it is unlikely that students at this age would be aware that the state pays the salary of some of their teachers, but that others are paid by parochial authorities, much less the constitutional significance of this difference.

Attempts by religious authorities to emphasize neutral aspects of New York City's church schools do not negate the powerful symbolic benefit to religion derived from on-premise Title I instruction. In striking down Massachusetts' unconstitutional delegation of legislative veto power to churches, this Court declared "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Larkin* v. *Grendel's Den*, ____ U.S. ____, 103 S. Ct. 505, 511 (1982). The import of community reaction to relations

between government and religion was also noted in *Lynch* v. *Donnelly*, ____ U.S. ____, 104 S. Ct. 1355, 1367 (1984) (O'Connor, J., concurring).

The state has effectively endorsed the religious mission of the religious schools by entering into a joint education program on the premises of church schools. The perception of the student and adult community is that New York City has placed its imprimatur on religious institutions.

POINT TWO

NEW YORK CITY'S TITLE I PROGRAM EXCESSIVELY ENTANGLES GOVERNMENT WITH RELIGION

A. Government Is Excessively Entangled with Religion when Public and Parochial Activities Are Merged and when Constant Surveillance Is Required to Maintain the Secular Content of Public Instruction

This Court's decisions on the unconstitutionality of publicly funded education services on parochial school premises are controlling. *Meek*, 421 U.S. 349. *Cf. Wolman*, 433 U.S. 229. Like the programs at issue in these cases, New York City's Title I program creates excessive entanglement between government and religion by merging secular and parochial instruction and by promoting associations between public and parochial employees for conferences in a pervasively religious atmosphere. Further, an obligation is imposed on the state to scrutinize the religious activities, content and values of secular personnel and instruction because the remedial services are provided on the premises of religious institutions.

Appellants have claimed that Title I supervisors ensure the nonreligious content of Title I instruction. Ensuring religious neutrality, in this case, however, requires excessive entanglement of the state employees with religion. This Court has articulated the constitutional necessity of such supervision:

> To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would

> have to impose limitations on the activities of auxiliary personnel and then engage in some form of a continuing surveillance to ensure that those restrictions were being followed.

Meek, 421 U.S. at 372 (footnote omitted). This is because the "State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion." *Meek*, 421 U.S. at 371, quoting *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971). Relying on *Lemon*, the *Meek* Court reiterated that the "prophylactic contacts required to ensure that teachers play a strictly nonideological role . . . necessarily give rise to a constitutionally intolerable degree of entanglement between church and state. 421 U.S. at 370.

To the extent that New York City's Title I supervision is constant and intrudes on religious activities, therefore, it constitutes impermissible excessive entanglement. Moreover, many areas of interaction between public and parochial teachers are completely unsupervised and present unrestricted opportunity for unconstitutional blending of secular and sectarian instruction. *See* this brief, Point I *supra*. The Supreme Court has stated, as the court of appeals in this case noted, that a court cannot rely on the "good faith and professionalism of secular teachers and counselors functioning in church-related schools" to maintain a strictly nonreligious posture. *Meek*, 421 U.S. at 369.

In *Wolman* v. *Walter*, 433 U.S. 229 (1977) this Court emphasized that the entanglement dangers recognized in *Meek* arise from the religious nature of the host school, and ruled that publicly funded therapeutic and remedial services could be provided to parochial students in religiously neutral locations. New York City's church-sponsored schools are obviously not religiously neutral. Neither the removal of some religious symbols nor the assertions of school authorities as to the religious nature of the schools can neutralize the essentially religious environment, or obviate the need for constant government surveillance.

B. The Surveillance Required By New York City's Title I Program Is Distinguishable from that Routinely Required in Public Schools and Can Be Avoided By Alternative Programs

Supervision of New York City's Title I professionals must ensure that remedial instruction, guidance and counseling services remain religiously neutral, and that public employees remain independent of religious authorities and influence when they are working in religious institutions. The Solicitor General has argued, *see* Brief for the Secretary of Education 37, that the surveillance required of public authorities over Title I instruction and professionals "is no different, in principle, from the 'surveillance' that may be necessary to ensure that teachers in the public schools comply with this Court's school prayer decisions." The Solicitor General's argument is totally without merit. The obligation to maintain the secular independence of public school personnel operating within church-sponsored schools involves far greater entanglement with religion than efforts by public school authorities to maintain a religiously neutral environment in the nonreligious public schools. Instructing public school teachers that daily recitation from the Bible and state composed prayer has been ruled unconstitutional by this Court requires no contact with religious activities or religious authorities and takes place in a nonreligious environment. In sharp contrast, supervision of Title I professionals in church schools requires detailed observation of classroom activity, teacher conduct, and ongoing, continuous contact between public and parochial personnel. Most important, the activity which must be monitored by the state, as well as the surveillance, takes place in a religious environment. *See Lemon*, 403 U.S. 602; *Meek*, 421 U.S. 349.

The degree of surveillance required under *Meek*, which rises to the level of unconstitutional entanglement with religion, can easily be avoided by an alternative Title I plan. Thus, a decision by this Court striking down the present plan need not result in any educational deprivation to parochial students. In developing alternative plans it should be noted that the requirements of Title

I do not specify equality in *services* as regards public and parochial school students. Although equality in *expenditures* is required, 20 U.S.C. 2740(a), Congress left formulation of Title I programs to the discretion of the local educational agency, encouraging school districts "to employ imaginative thinking and new approaches to meet the educational needs of poor children." S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News 1446, 1455.

Any alternate plan must take into consideration the constitutional parameters in this area. In *Wheeler* v. *Barrera*, 417 U.S. 402, 421 (1974), the Court noted that Congress recognized "that in some States certain programs for private and parochial schools would be legally impossible because of state constitutional restrictions, most notably in the church-state area." In New York City, the court of appeals noted, an early proposal to include parochial school students in Title I classes held in public schools with public students was rejected in part because of concern that it would violate the New York Constitution, Art. XI, § 3. Slip op. at 7.

This Court stated in *Wheeler* that it is the responsibility of the local educational agencies to devise a constitutional means of providing Title I services to parochial school students. Although the Court recognized that it "may well be a significant challenge," 417 U.S. at 423, Justice Blackmun's language was instructive:

> Of course, the cooperation and assistance of the officials of the private school are obviously expected and required in order to design a program that is suitable for the private school . . . and the overall program is not to be defeated simply because the private school refuses to participate unless the aid is offered in the particular form it requests.

Wheeler, 417 U.S. at 424. Justice Blackmun also noted alternative programs listed in the Senate Report accompanying passage of Title I in 1965:

> Among the examples there listed are teacher aides and instructional secretaries; institutes for training teachers in

> special skills; supplementary instructional materials; curriculum materials center for disadvantaged children; preschool training programs . . . enrichment programs on Saturday morning and during summer; instructional media centers to provide modern equipment and materials; programs for the early identification and prevention of dropouts; home and school visitors and social workers; supplemental health and food services; classrooms equipped for television and radio instruction; mobile learning centers; educational summer camps; summer school and day camps; shop and library facilities available after regular school hours; work experience programs; Saturday morning special opportunity classes; home oriented bookmobiles; afterschool study centers. . . .*

Wheeler, 417 U.S. at 425, n.20.

Clearly, alternatives to programs on church school premises exist which obviate the need for impermissibly entangling surveillance, should New York City choose to implement an alternative Title I program.

POINT THREE

THE DIRECT AND SUBSTANTIAL GOVERNMENT AID TO PAROCHIAL SCHOOLS DERIVED FROM NEW YORK CITY'S TITLE I PROGRAM CAN BE DISTINGUISHED FROM GOVERNMENT AID THAT HAS PREVIOUSLY BEEN HELD PERMISSIBLE

In *Everson* v. *Board of Education*, 330 U.S. 1, 17 (1947), the Court upheld a state statute which authorized reimbursement to parents for expenses incurred in busing their children to parochial schools, while noting that "some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets." Similarly, the Court noted the fact that "[p]erhaps free books make it more likely that some children choose to attend a sectarian school," in

* *Amicus* does not necessarily endorse all of the above-mentioned approaches to Title I services. They are offered, as in *Wheeler*, simply to demonstrate that numerous alternative programs can be considered.

Board of Education v. *Allen*, 392 U.S. 236, 244 (1968). The cost of bus fares and textbook loans, of course, does not compare with the expense of remedial mathematics and English instruction, guidance and clinical services provided under Title I. Moreover, the Court's decisions in *Everson* and *Allen* rest on grounds which are easily distinguishable from the case at issue. In *Everson*, the Court was concerned that reimbursing bus fares of public school students, while denying the same benefit to parochial school students, would evidence government hostility to religion. *Everson*, 330 U.S. at 17-18. By contrast, invalidating Title I instruction on parochial school premises would merely prompt the City to devise a constitutional means of providing remedial services to parochial school students.

In both *Everson* and *Allen*, the Court relied on the secular nature of the state aid to parochial schools, *i.e.*, bus rides and nonreligious books. *Allen*, 392 U.S. at 244-245. In upholding textbook loans, the *Allen* Court relied on the fact that the statute in question would not involve the state with the teaching of religion in parochial schools. *Allen*, 392 U.S. at 248. While it is difficult to change the secular nature of a book or a bus ride, the aid provided under Title I, *i.e.*, teachers, guidance and counseling professionals, cannot be so easily contained. Teachers, unlike books, can absorb the religious atmosphere in which they work and, in turn, reflect that bias to students, with unconscious inattention to establishment concerns. *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971) ("Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment."). Moreover, as *Meek* makes clear, we cannot rely on the "good faith and professionalism" of teachers, *Meek*, 421 U.S. at 369, to ensure the religious neutrality of public instruction in church schools.

In addition, remedial education instruction is infinitely more valuable to school children than state financed bus fares or textbook loans. In the Senate Report accompanying the Elementary

and Secondary Education Act of 1965, the Labor and Public Welfare Committee stated:

> Title I can be considered as another very potent instrument to be used in the eradication of poverty and its effects. Under title I of this legislation the schools will become a vital factor in breaking the poverty cycle by providing full educational opportunity to every child regardless of economic background.

S. Rep. No. 146, 89th Cong., 1st Session, *reprinted* in 1965 U.S. Code Cong. & Ad. News 1446, 1450. Remedial instruction and services received through Title I funding may determine a child's future success in higher education or employment. Many parents of children eligible under Title I would not send their children to parochial schools if the remedial services were not available on the premises. The availability of such services enhances the attraction of parochial schools and may well augment student enrollment, fostering the school's religious mission. Undoubtedly, the parochial school students receiving the services, and their parents, are aware of the substantial benefit of receiving Title I instruction during the regular school day on the premises of their own parochial schools. No additional cost, traveling or time is required of the parochial school students. In addition, the availability of on-site remedial education services operates as a powerful enrollment inducement for parochial schools.

These benefits are more substantial and more direct than the tuition tax deductions at issue in *Mueller* v. *Allen*, ___ U.S. ___, 103 S. Ct. 3062 (1983). In *Mueller*, the state was not directly involved with religious institutions. Tuition aid was funneled through parochial school *parents*, which, the Court held, "reduced Establishment Clause objections." *Mueller*, 103 S. Ct. at 3069. The *Mueller* Court ruled that the "attenuated financial benefits flowing to parochial schools" under the challenged Minnesota statute, do not violate the prohibitions of the First Amendment. In the case at issue, however, public funding flows directly from the government into the parochial schools in the form of remedial instruction and counseling services. Public employees

are present on parochial school premises to administer the program, unlike *Mueller.* where tuition tax deductions were evaluated by public employees in state offices. Although the majority in *Mueller* rejected statistical evidence demonstrating the ultimate beneficiaries of the tuition tax program, such statistics are not necessary here. The involvement of church-related schools in the Title I program is undisputed, and the availability of Title I services on the premises of the parochial schools is a "blend [of] secular and sectarian education" which is prohibited by the establishment clause. *Zorach* v. *Clauson*, 343 U.S. 306, 314.

In *Lynch* v. *Donnelly*, ___ U.S. ___, 104 S. Ct. 1355, 1366 (1984), citing with approval to *McCollum* v. *Board of Education*, 333 U.S. 203 (1948); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973); *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973); *Meek* v. *Pittenger*, 421 U.S. 349 (1975), this Court stated: "Taken together these cases abundantly demonstrate the Court's concern to protect the genuine objectives of the Establishment Clause." Amicus submits that this Court's precedential rulings on government aid to religious schools compel a decision invalidating New York City's Title I program as it relates to parochial schools.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully submits that the judgment of the United States Court of Appeals for the Second Circuit, holding New York City's Title I program unconstitutional, should be affirmed.

Respectfully submitted,

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